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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-55 (Sub-No. 631X)[1]

CSX TRANSPORTATION, INC.—ABANDONMENT EXEMPTION—IN SUMMIT COUNTY, OH

STB Docket No. 42086

TERMINAL WAREHOUSE, INC. v. CSX TRANSPORTATION, INC.

Decided: May 10, 2004

This decision addresses a petition to revoke a use of the class exemption under which railroads may abandon lines that have been out-of-service for more than 2 years. The principal basis for the petition to revoke is that the line in question did not qualify for the out-of-service exemption because, during the claimed 2-year out-of-service period, the line allegedly had been subject to an unlawful embargo. In this decision, the Board finds that the embargo that was in place during part of the 2-year period has not been shown to be unlawful or unreasonable, and that the carrier properly invoked the exemption. Therefore, the petition in STB Docket No. AB-55 (Sub-No. 631X) to revoke the use of the class exemption is denied. In STB Docket No. 42086, a separate complaint alleging that the embargo of the line was illegal is dismissed.

BACKGROUND

CSX Transportation, Inc. (CSXT), filed a notice of exemption under 49 CFR 1152 Subpart F–Exempt Abandonments to abandon a line of railroad, known as the Lumber Lead, extending from former Conrail milepost 11.49 to a point at or near former Conrail milepost 11.56, a distance of approximately 0.07 of a mile, in Summit County, OH (the Line). Notice of the exemption was served and published in the Federal Register on April 15, 2003 (68 FR 18327-28). An environmental assessment (EA) was served on April 18, 2003. No comments were received. A decision served on May 14, 2003, reopened the proceeding and imposed environmental conditions that were recommended in the EA. The exemption became effective on May 15, 2003. CSXT notified the Board on May 27, 2003, that it had consummated the abandonment on May 23, 2003.

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[1] These proceedings are not consolidated. A single decision is being issued for administrative convenience.

On July 8, 2003, Terminal Warehouse, Inc. (Terminal Warehouse or petitioner) filed a petition to revoke the exemption with respect to the Line. Petitioner requests relief based on two legal theories. First, it argues that the notice of exemption contained false and/or misleading information, making the notice void ab initio under 49 CFR 1152.50(d)(3). Alternatively, it asks, under 49 U.S.C. 10502(d), that the exemption be revoked, because the Line is needed to carry out the rail transportation policy of 49 U.S.C. 10101.

Terminal Warehouse is a public/contract storage and distribution company in Akron, OH, which currently operates three facilities in the Akron area. Shippers have in the past transported goods or raw materials to Terminal Warehouse's facilities by truck or by rail for storage and distribution. Petitioner states that during the last several years, shippers have transported raw materials or goods to Terminal Warehouse's Home Avenue facility on several occasions. According to petitioner, this abandonment involves the single remaining rail line providing rail access to it.

The last shipment over the Line moved on January 20, 2001. On or about February 11, 2002, the bridge on the Line over Eastwood Avenue (Eastwood Avenue Bridge or Bridge) was damaged by a third-party contractor installing fibre optic cable. According to CSXT, the damage was beyond repair, causing the Eastwood Avenue Bridge to become structurally unsound, which required the closure of Eastwood Avenue (which has one 8-foot wide lane under the Bridge) by the City of Akron. According to CSXT, the Bridge was damaged to the extent that it could not be properly stabilized to protect the vehicular traffic underneath it, and thus removal was the only means readily available to permit the reopening of Eastwood Avenue. Thus, during the first 2 weeks of June 2002, a contractor took down the Bridge to allow Eastwood Avenue to be reopened to vehicular traffic, and the City of Akron then widened Eastwood Avenue. After removal of the Bridge, CSXT issued an embargo for the Line on August 2, 2002.

PROCEDURAL MATTERS

On July 23, 2003, Petitioner filed a notice to permit discovery about unspecified matters. Under 49 CFR 1121.2, "a party must file its discovery requests at the same time it files its petition to revoke." Petitioner acknowledges that it did not seek discovery on the same day it filed its petition to revoke, but asserts that CSXT will not be harmed because it had not yet filed a response to the petition to revoke. CSXT contends that it would be prejudiced by discovery because, if discovery is permitted, it would incur additional costs and divert personnel from their normal tasks. Terminal Warehouse has not shown that its discovery request seeks information that is relevant to the Board's limited inquiry here. Therefore, the request for discovery will be denied.

Petitioner also filed a request for oral argument. It contends that oral argument would enable the Board to fully understand and weigh any conflicting evidence. CSXT opposes the request. While the Board likes to hold oral arguments when the argument will help to develop a complete and accurate record, the issues here can be decided on a written record.

CSXT filed motions to strike a reply memo and supplemental verified statement filed by Terminal Warehouse in support of its petition for revocation. It argues that the reply memo is an impermissible reply to a reply. 49 CFR 1104.13(c). It also states that the supplemental verified statement was filed more than 2 months after the petition to revoke, and it points out that, under 49 CFR 1121.3(c), a party seeking revocation of an exemption must submit all of its supporting evidence when it files the petition. In the alternative, CSXT seeks to respond to the two filings.

As no party will be prejudiced, and in the interest of developing a complete record, the motions to strike will be denied, and the responses of CSXT to the reply memo and the supplemental verified statement will be accepted.

PETITIONER'S ARGUMENTS

Terminal Warehouse argues that the notice of exemption should be found to be void ab initio under 49 CFR 1152.50(d)(3) because it contained false and/or misleading information and failed to disclose critical facts to the Board. Although the last shipment on the Line was on January 20, 2001, the Line had been declared unuseable since August 2002, and Terminal Warehouse argues that, with the Line embargoed, "it was impossible for local rail traffic to move over the Line." Therefore, while conceding that the certification that no traffic had moved over the line for two years prior to the filing of the notice of exemption was "technically true," Terminal Warehouse submits that it was "very misleading." See petition to revoke at 7. Terminal Warehouse asserts that CSXT had a duty to timely repair the Line, and should not be rewarded for its failure to do so. It also argues that a line cannot be abandoned if a rail carrier has engaged in an unreasonable or unlawful embargo. Finally, Terminal Warehouse contends that CSXT failed to certify that any overhead traffic on the Line could be rerouted over other rail lines.

DISCUSSION AND CONCLUSIONS

Petition to Revoke. Before the Board can consider the petition to revoke an abandonment exemption, it must determine whether it retains jurisdiction over the Line. Ordinarily, when an abandonment has been lawfully consummated, the agency loses jurisdiction over the property. See Hayfield Northern v. N.R.R. v. Chicago & N.W. Transp. Co., 622, 633 (1984), Montezuma Grain Co. v. STB, 339 F.3d 535 (7th Cir. 2003). A notice of consummation is considered to be conclusive evidence of abandonment consummation if there are no legal or regulatory barriers to consummation (such as outstanding conditions). 49 CFR 1152.29(e)(2). As noted, abandonment of the Line was consummated on May 23, 2003.

In rare instances where there has been fraud or a ministerial error, the Board may assert jurisdiction over property after abandonment authority has been exercised. Indeed, in the class exemption for abandonment of out-of-service lines, the Board has expressly reserved jurisdiction to declare a railroad's notice of an exempt abandonment to have been void ab initio if that notice contained false or misleading information. See 49 CFR 1152.50(d)(3). Thus, the Board will consider whether the notice contained false or misleading information.

Here, the Board finds no defect in the notice. First, in accordance with the regulations at 49 CFR 1152.50(d)(1), CSXT notified the Public Utilities Commission of Ohio; the Ohio Rail Development Commission; the Military Traffic Management Command of the U.S. Department of Defense; the National Park Service, Land Resources and Recreation Resources Divisions; and the U.S. Department of Agriculture. Second, CSXT also certified that it complied with the environmental notice requirements of 49 CFR 1105.7(b) and 49 CFR 1105.11, and the newspaper notice requirement of 49 CFR 1105.12. Third, CSXT made the required certifications to invoke the 2-year out-of-service exemption: a rail carrier must certify that no local traffic has moved over the line for at least 2 years; that any overhead traffic on the line can be rerouted over other lines; and that no formal complaint filed by a user of rail service on the line (or a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Board or with a U.S. District Court or has been decided in favor of the complainant within the 2-year period.[2]

It is undisputed that the line had been inactive for more than two years. And contrary to petitioner's contention, CSXT satisfied the requirement that it certify that overhead traffic could be rerouted through its certification that there was no overhead traffic on the Line. Finally, Terminal Warehouse has not shown that a complaint about the cessation of service was filed during the relevant

[2] A relevant complaint must have alleged (if pending) or proven (if decided) that the carrier has imposed an illegal embargo or other unlawful impediment to service. 49 CFR 1152.50(b).

period. Indeed, Terminal Warehouse might have had a stronger case here if it or anyone else had even requested rail service from CSXT during the period at issue, but there is no record evidence of that.

Terminal Warehouse's concern, however, is that CSXT could not provide service for the last six months of the two years, because CSXT imposed an illegal embargo on the Line. Petitioner now argues that the notice was misleading, because the embargo was unlawful or unreasonable and the Line was therefore not really out-of-service for two years.

That argument is incorrect. Under 49 U.S.C. 11101(a), railroads have a common carrier obligation to provide service upon reasonable request. However, a carrier may temporarily embargo a line when physical conditions on the line preclude it from operating safely over the line. Whether an embargo is reasonable, as well as how long an embargo may reasonably continue, is typically determined by considering various factors, such as: the cost of repairs necessary to restore service, the amount of traffic on the line, the intent of the carrier, the length of the service cessation, and the financial condition of the carrier. Bolen-Brunson-Bell Lumber Company, Inc. v. CSX Transportation, Inc., STB Finance Docket No. 34236 (STB served May 15, 2003) at 3-4 (citations omitted).

Terminal Warehouse has not submitted evidence to support its argument that the embargo was unreasonable. It has made general allegations, such as that CSXT had a duty to repair the Line, but it has not addressed most of the factors used by the Board in determining the reasonableness of an embargo. Terminal Warehouse cites GS Roofing Products Co. v. STB, 143 F.3rd 387 (8th Cir. 1998) (GS Roofing I) and 262 F.3d 767 (8th Cir. 2001) (GS Roofing II). But unlike this case, in GS Roofing I, in which the court held that there was an illegal embargo, the shipper clearly wanted to ship, asked to ship, and was turned down by the carrier. Here — although it submitted testimony from a shipper that used to use the Line, but apparently stopped doing so several months before the bridge went out of service — the record does not show that any shipper requested service from CSXT during the 2-year out-of-service period. Any inquiry about CSXT's duty to repair the Line would have to be predicated upon CSXT's having received a reasonable request for service. Finally, GS Roofing II did not address the issues that petitioner has raised in its petition to revoke.

Petitioner points out that CSXT did not issue the embargo until August 2, 2002, which was 2 months after the Bridge had been removed and 6 months after it was allegedly damaged beyond repair. But it appears that there was no rush to issue an embargo because there had been no request for service for more than a year prior to the damage to the Bridge.

Terminal Warehouse states that CSXT did not notify Terminal Warehouse, any government agency, or the Board, either verbally or in writing, of the damage to the trestle, the embargo, or the fact that CSXT had removed part of its rail structure. Terminal Warehouse asserts that, not only did CSXT fail to notify anyone of these facts before it took its actions, but it did not disclose these facts in its

notice of exemption. However, CSXT complied with all of the notice requirements of the Board's regulations at 49 CFR 1152.50. CSXT was not required to mention Bridge-related information in the notice or to individually notify Terminal Warehouse in writing before filing its notice. In any event, CSXT asserts, and the record confirms, that notice was given to Petitioner "from various conversations with CSXT representatives." Reply to petition to revoke at 7. CSXT submits that the City of Akron was well aware of the Bridge closing and was on actual notice of its removal and tacitly concurred in it.

Finally, Terminal Warehouse argues that the exemption should be revoked because the Line is allegedly necessary to carry out the rail transportation policy. In this regard, Terminal Warehouse mentions that a shipper is temporarily storing two hopper cars on rail siding and that abandonment of the Line would leave the rail cars permanently isolated so that they could be used only for perpetual storage. Terminal Warehouse further asserts that it has lost business. With support from local political interests, it also submits that CSXT should install a switch at a cost of about $60,000, which it claims would likely be reimbursed by a third party.

As noted, the Board lost jurisdiction over the property when CSXT lawfully consummated the abandonment. But even if the Board had jurisdiction, petitioner has not shown a basis for granting the request. The mere fact that petitioner wants the Line to remain intact is not enough given the lack of traffic, the potential expense that would be incurred in putting the Line back into service, and the expense that would undoubtedly be incurred in maintaining it thereafter.

The Complaint. On February 12, 2004, Terminal Warehouse filed a separate but related complaint alleging that the embargo was unlawful and requesting reinstitution of service as well as damages. CSXT filed an answer on March 2, 2004, and seeks dismissal of the complaint.[3] While the Board can no longer require service on the line, it could, under appropriate circumstances, award damages under 49 U.S.C. 11704(b) for an illegal embargo during the period prior to abandonment. But petitioner's complaint, which mirrors its request for revocation, does not make a prima facie case that could defeat a motion to dismiss. While Terminal Warehouse asserts that CSXT denied requested service, its supporting documents (which include most of the evidence already presented in the revocation proceeding) fail to show that any shipper requested service from CSXT between the date of the bridge damage and the date of the abandonment. It is unreasonable to suggest that CSXT should have repaired the line for service when no service had been requested. And if no shipper requested service, then Terminal Warehouse's claim for damages could not possibly succeed.

[3] The parties jointly submitted a proposed procedural schedule for the complaint proceeding. Terminal Warehouse also seeks oral argument. In light of the action being taken in this decision, it is not necessary to schedule an oral argument or to adopt a procedural schedule.

The Board may dismiss a complaint that it finds "does not state reasonable grounds for investigation and action." 49 U.S.C. 11701(b). Because this complaint cannot succeed, the Board will dismiss it.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition to revoke is denied.

2. The motions to strike are denied, and the alternative requests to respond are granted.

3. The discovery request is denied.

4. The request for oral argument is denied.

5. The complaint is dismissed.

6. This decision is effective on its service date.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary